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14 *and as representative of the Plaintiff Estate of Daniel Shaver*

15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE DISTRICT OF ARIZONA**

17 Laney, Sweet an individual, et al.,
18
19 Plaintiffs,
20 v.
21 City of Mesa, et. al.,
22 Defendants.

23 Grady Shaver, et. al.,
24
25 Plaintiffs,
26 v.
27 City of Mesa, et al.,
28 Defendants.

Case No. 2:17-cv-00152-PHX-GMS
LEAD CASE

CONSOLIDATED WITH:
Case No. 2:17-cv-00715-PHX-GMS

**SWEET PLAINTIFFS' EXPEDITED
MOTION FOR PROTECTIVE ORDER
AGAINST THE BRAILSFORD
DEFENDANTS' SUBPOENA DUCES
TECUM TO SETEC
INVESTIGATIONS, INC.**

(Oral Argument Requested)

29 The Brailsford Defendants have tried to directly circumvent this Court's Order of March
30 3, 2020 [Doc. 396, at 2 lns. 10-13] and the Sweet Plaintiffs'¹ objections to their overly broad
31 and disproportionate direct document requests for data off Laney Sweet's former cell phone by
32 issuing an overly broad and disproportionate, harassing, and knowingly defective subpoena

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¹ The "Sweet Plaintiffs" are Laney Sweet, her minor children, N.S. and E.S., and the Estate of Daniel Shaver.

1 duces tecum (the “Subpoena” (copy filed at Doc. 415-1)) against a third-party forensics
2 company, Setec Investigations, Inc. (“Setec”). Setec is a company that created a forensic copy
3 of Ms. Sweet’s cell phone so that it was preserved for another discovery dispute that is
4 underway now and is the subject of the Mesa Defendants’ Motion Regarding Proposed Search
5 Term Protocol (“Search Protocol Motion”) [Doc. 421]. The Court has ordered all the parties,
6 including the Brailsfords, that they “shall” abide by a specific forensic search process to obtain
7 *any* information off Ms. Sweet’s cell phone, and told the Brailsfords and others this was “to
8 protect Plaintiff [Laney Sweet]’s interest in privileged communications or irrelevant
9 discovery.” [Doc. 396, at 2 lns. 10-13]. The Subpoena proves that the Brailsfords have violated
10 that Order to try and get the phone data through a completely different, unbridled discovery
11 process and that they care nothing about protecting the Sweet Plaintiffs’ against irrelevant
12 discovery or disclosure of privileged materials like the Court ordered them to do. And, in
13 further violation of their duties under the Federal Rules of Civil Procedure, the Brailsfords’
14 subpoena flaunts the most basic restrictions on discovery under Rules 26 and 45.

15 The Brailsfords refuse to await the scheduled search of the phone data ordered by the
16 Court, and seek instead to compel Setec to produce almost every bit of data from Plaintiff Laney
17 Sweet’s former cell phone for the entire time Ms. Sweet used it. This demands production,
18 among other things, of all voice recordings, e-mails, text messages, social media data, photos,
19 images, music files, personal notes, financial information, and other records off the phone’s
20 memory. Ms. Sweet or others created and saved much if not most of the phone data for either
21 private or business purposes long before the killing of Ms. Sweet’s husband on which this action
22 rests. Yet, the Brailsfords have made no attempt to limit the requested data to any time period,
23 any subject matters, any particular communications, photos, or other data, or by connecting
24 their requests with any persons who might actually have information related to the shooting of
25 Daniel Shaver or the damages specifically sought by the Sweet Plaintiffs. Their Subpoena
26 would also could compel production of attorney-client privileged communications that might
27 be on the phone, as well as any doctor-patient privileged communications and even the private
28 medical information of Ms. Sweet’s doula clients. The Subpoena is therefore not only a

1 violation of this Court’s March 3, 2020 Order, but it violates Rules 26(b)(1), 26(b)(2)(C), and
2 45(d),(e), Fed.R.Civ.P. It also unjustifiably impinges upon the constitutionally recognized
3 privacy interests of Ms. Sweet and those whom she used to phone to contact, and exposes her
4 to unwarranted embarrassment and annoyance.

5 Though questions exist about whether the Brailsford Defendants have ever completed
6 service of the Subpoena², the Sweet Plaintiffs nevertheless timely notified the Brailsfords in
7 April that they had objections to the Subpoena if it ever got served [Exhibit 1], and then sent
8 the Brailsfords’ attorneys their further written objection and detailed analysis of the layers of
9 problems with the Subpoena last Friday, May 8, 2020, just some seven days after the Sweet
10 Plaintiffs’ counsel received a follow-up letter from the Brailsfords’ counsel to the Subpoena
11 target that purported to fix any prior service problems, [Exhibits 3 (Sweet Plaintiffs’ objection
12 letter), 2 (Brailsford letter)]. The Sweet Plaintiffs laid out the clearly excessive and
13 inappropriate aspects of the Subpoena that violate Rule 26(b), Fed.R.Civ.P. and invoke the
14 Court’s power to quash under Rule 45(d),(e), Fed.R.Civ.P. The Sweet Plaintiffs explained why
15 the Subpoena was overly broad, unduly burdensome, and disproportionate to the matters at
16 issue in the case, stating:

17
18 ² The record confirms that the Brailsfords initially failed to attach their proposed subpoena to
19 Setec when they filed their Notice of Intent to Serve Subpoena [*see* Doc. 411, 415], and then
20 they purportedly sent the subpoena via Federal Express to a Los Angeles, California address
21 that Sweet Plaintiffs’ counsel understands is not a physical address for Setec. The address
22 appears, per a Google search, to house a UPS Store and other retail establishments that are not
23 Setec. As a courtesy, the Sweet Plaintiffs’ counsel told the Brailsfords’ counsel by letter dated
24 April 27, 2020, that they understood from Setec that Setec had never been served with the
25 Subpoena. [*See* Exhibit 1]. The Brailsfords’ counsel claimed in a later letter sent to the same
26 Los Angeles address for Setec [*see* Exhibit 2] that they had sent a “follow-up letter” to Setec
27 that was received by Setec and signed by “C. Covid.” It seems highly suspicious that a properly
28 served subpoena would be accepted by someone with the last name of “Covid” during the height
of the shut-down orders in Los Angeles and elsewhere for the “Covid 19” virus. Nevertheless,
like in *Special Mkts. Ins. Consultants, Inc. v. Lynch*, 2012 U.S. Dist. LEXIS 61088, *2-3 n. 1,
9-13 (N.D. Ill. May 2, 2012), where there was substantial question about whether a subpoena
had been properly served, this Court may rule on the impropriety of the Subpoena and issue
appropriate protective orders and quash it.

1 [T]he Brailsford Defendants’ only basis to seek such unlimited information is for
2 improper and objectionable purposes intended to conduct an improper fishing
3 expedition and delve into the private and unrelated communications of Ms. Sweet
4 and/or any of the numerous, unrelated individuals whom she communicated with.
5 This is even more evident by the lack of any relevant time frame or scope of the
6 subpoena’s inquiry for “*any and all data*” stored on Ms. Sweet’s personal cell
7 phone. We previously advised the Brailsford Defendants that Setec Investigations
8 captured a complete forensic image of Ms. Sweet’s cell phone in November, 2019.
9 Thus, the Brailsfords’ subpoena, taken at face value, seeks the production of that
10 entire set of data – years’ worth of personal and privileged communications, photos,
11 music, contacts, videos, and information. The wrongful killing of Daniel Shaver by
12 Defendant Brailsford and the limited civil rights, wrongful death, and other tort
13 claims by the Sweet Plaintiffs certainly do not grant Defendants unfettered access
14 to unlimited personal information with no limitations as to time, nature of the
15 information, content, or subject matter.

16 [Exhibit 3 at 2]. And, the Sweet Plaintiffs notified the Brailsfords’ counsel that: (1) their
17 Subpoena made no carve-outs for private, non-relevant communications and information that
18 is commonly found on a cell phone; (2) would require production of totally irrelevant, private
19 and confidential information that might be related to Ms. Sweet’s family and friends; (3) would
20 require production of any private communications and data that might exist on the phone about
21 Ms. Sweet’s doula business and her clients’ medical issues; and (4) also required production of
22 privileged and private items like any doctor-patient communications or potential attorney-client
23 communications that may have been stored on the phone. [*See id.* at 3-4]. The Sweet Plaintiffs
24 also explained how even the Subpoena’s limited carve-out for communications with a few
25 named persons associated with the Sweet Plaintiffs’ law firms did not allow Setec to cull all
26 potentially privileged attorney-client communications – after all, Setec cannot know how to
27 identify any other “individuals employed at” the Sweet Plaintiffs’ law firms. [*See id.* at 3-4].
28 And, even the Brailsfords’ counsel knows they left out names that have appeared as counsel of
record for the Sweet Plaintiffs, like attorneys David Wood and Leslie Ross [*see* Doc. 99 (Sweet
Plaintiffs’ Response to the Brailsfords’ Partial Motion to Dismiss Plaintiff Laney Sweet’s First
Amended Complaint naming attorneys Wood and Ross in the caption)]. Thus, as a practical
matter they would have Setec produce Ms. Sweet’s attorney-client privileged communications
with those counsel if any appeared in the phone data.

1 The Brailsfords have responded in writing indicating that they will not withdraw or
2 modify the subpoena. [See Exhibit 4 (messages from Counsel Karen Stillwell)]. They did not
3 provide an answer to the Sweet Plaintiffs’ demand that they “specifically identify what basis
4 they have to request unfettered access to “*any and all data*” stored on Ms. Sweet’s Samsung
5 Galaxy cell phone.” Therefore, the Sweet Plaintiffs are forced to seek protection from the
6 unwarranted production of information and data that is the exclusive property of Plaintiff Laney
7 Sweet and that Setec is merely the temporary custodian of for preservation purposes. The Sweet
8 Plaintiffs therefore invoke their rights and standing under Rule 26(c)(1) and Rule 45(e) of the
9 Federal Rules of Civil Procedure to seek a protective order and separate order quashing the
10 Subpoena to prevent Setec from complying with the Subpoena and producing private and
11 personal records belonging exclusively to Plaintiff Laney Sweet. See, *Silcox v. AN/PF*
12 *Acquisitions Corp.*, No. C17-1131 RSM, 2018 U.S. Dist. LEXIS 53536, at *6-8 (W.D. Wash.
13 Mar. 29, 2018)(“[A] party clearly has standing to seek a protective order to limit discovery from
14 a third party.” (citing *Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc.*, 231 F.R.D. 426,
15 429 (M.D. Fla. 2005)); see also, *HomeLife in the Gardens, LLC v. Landry*, No. 16-15549, 2018
16 U.S. Dist. LEXIS 19204, at *9 (E.D. La. Feb. 6, 2018) (“[T]he Court finds that the Defendant
17 has standing as these [subpoenaed emails, phone records, text records and cell phone logs] are
18 her personal communications and implicate [Defendant]’s privacy interests.”).

19 **I. The Subpoena is a Violation of this Court’s March 3, 2020 Order and is**
20 **Inappropriately Duplicative.**

21 As mentioned above, the contents of Laney Sweet’s former Samsung cell phone are
22 already the subject of a motion pending before this court by the Mesa Defendants about how to
23 search, retrieve and report on certain files that might appear on Ms. Sweet’s phone. [Doc. 421].
24 That motion is fully briefed and ready for decision. Shortly, then, the parties will be proceeding
25 with discovery of limited materials from the Laney Sweet phone.

26 Moreover, that process is being performed to comply with this Court’s March 3, 2020
27 Order which provided, in relevant part:

28 IT IS FURTHER ORDERED directing Ms. Sweet to produce her Samsung
 cellphone for forensic examination by a third-party examiner using agreed upon

1 search terms at Defendants' expense. The parties shall follow the procedure set
2 forth at the hearing to protect Plaintiff's interest in privileged communications or
3 irrelevant discovery.

4 [Doc. 396, at 2 lns. 10-13]. The Order does not carve out any exceptions for a different
5 discovery procedure by the Brailsfords. Rather, they were represented at the status conference
6 from which the Order emanated, and they are included in the plural terms "Defendants" and
7 "parties" who are ordered to "follow the procedure set forth at the hearing to protect Plaintiff's
8 interest in privileged communications or irrelevant discovery." The foregoing discussion
9 proves the Brailsfords have, by their Subpoena, directly violated the Court's Order and sought
10 to conduct an "end-run" on the Court and the Sweet Plaintiffs. Moreover, the Subpoena is, at
11 best, wasteful and duplicative given the proceeding discovery. The Court should order the
12 Brailsfords to comply with its prior Order, quash the Subpoena, and order that the Brailsfords
13 pay the Sweet Plaintiffs' expenses and attorneys' fees for having to force the Brailsfords to
14 comply with an order they knew they were bound by.

15 **II. The Brailsfords Made No Attempt to Tie the Subpoena to Any Disputed Claims or
16 Defenses or Discoverable Matters.**

17 The Brailsfords know they are seeking a full copy of all data on a cell phone Ms. Sweet
18 used for an extended period before her husband's death in January, 2016, and for a much shorter
19 period thereafter. Their Subpoena demands that Setec produce:

20 "Any and all data, work, output, correspondence, billing, retention agreement,
21 scope of work, computer files, forensic reports, etc., including any forensic
22 reports, data, information, examination reports related to altered and/or deleted
23 data, on Laney Sweet's Samsung Galaxy Note 3 cell phone and any other
24 electronic device provided by Baskin Richards, PLC and/or Geragos & Geragos,
25 P.C. related to the lawsuit, *Laney Sweet, et al v. City of Mesa, et. al*, 2:17-cv-
26 00152-GMS in the United States District Court, District of Arizona." (emphasis
27 added).

28 [Exhibit 1 at Exhibit A]. They know Ms. Sweet has had friends and family with whom she has
communicated, and that she could not possibly have been communicating with them before
Daniel's killing about any of the events from which her claims arise. They know she was a
professional doula (a trained professional who provides physical, emotional and information
support to expectant parents before, during and even after childbirth), and could reasonably

1 expect she might have been communicating with clients about their medical or personal, family,
2 psychological, or other highly personal issues using her cell phone before Daniel was killed.
3 They know she did not live in the same state with the attorneys she engaged after Daniel's
4 killing and therefore may have communicated with them or their staff using her phone for
5 texting, etc. And they know that not every detail or incident of even her private family life
6 before or after Daniel's killing could reveal information discoverable in this limited claim
7 action. This Subpoena comes at the very tail end of discovery, after the Brailsfords have already
8 filed their initial summary judgment motion. The Brailsfords know what is and is not at issue
9 in this matter, and they purposefully have decided to tie this Subpoena to none of those issues.

10 The Subpoena has absolutely no subject matter limits. It has absolutely no temporal
11 limits. It makes no attempt whatsoever to limit production to communications between Ms.
12 Sweet and persons who might have actually been involved in and conveyed discoverable
13 information about matters at issue in this case. And, it irresponsibly demands a production that
14 would provide every single text, e-mail, social media post, photograph, music file, video file,
15 personal notes, on-line shopping history, on-line search history, and every other scrap of data
16 about Ms. Sweet's personal life, as well as the lives of her clients, her friends, and her family
17 for months and months before Brailsford killed Daniel Shaver. It unapologetically demands
18 production of "*any and all data*" retrieved off Ms. Sweet's personal cell phone by Setec.
19 Because that was a full forensic image of the phone data, the Brailsfords have made no attempt
20 at all to tie their Subpoena to issues in this case, or discoverable, non-privileged information
21 they have reason to believe may exist on the phone.

22 **III. The Subpoena is a Facial Violation of Rules 26(b),(c) and 45(d)(e), Fed.R.Civ.P.**

23 **A. The Brailsfords had to proactively comply with the discovery limitations in**
24 **Rule 26(b),(c), Fed.R.Civ.P., as well as those in Rule 45.**

25 In this Circuit, a Rule 45 subpoena to a non-party must comply with *both* the limits under
26 Rule 45(d)(1)(2),(e)(2), Fed.R.Civ.P. and those under Rule 26(b), Fed.R.Civ.P. *See, Exxon*
27 *Shipping Co. v. U.S. Dept. of Interior*, 34 F.3d 774, 779 (9th Cir. 1994) (applying both Rule 26
28 and Rule 45 standards to rule on a motion to quash subpoena); *Gonzales v. Google, Inc.*, 234

1 F.R.D. 674, 679-80 (N.D. Cal. 2006)(noting also that the Advisory Committee Notes to the
2 1970 Amendment to Rule 45 state that the “scope of discovery through a subpoena is the same
3 as that applicable to Rule 34 and other discovery rules”, and that the reference to Rule 34
4 necessarily invoked the limits under Rule 26(b)) *Silcox*, No. C17-1131 RSM, 2018 U.S. Dist.
5 LEXIS 53536, at *6 (citing *Nidex Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 577 (N.D. Cal.
6 2007); *In Re Subpoena of DJO, LLC*, 295 F.R.D. 494, 497 (S.D. Cal. 2014); *see also, Heat &*
7 *Control, Inc. v. Hester Industries. Inc.*, 785 F.2d 1017 (Fed. Cir. 1986) (“rule 45(b)(1) must be
8 read in light of Rule 26(b)”). Courts in this and other circuits apply the test of “relevance” for
9 discovery purposes to Rule 45 subpoenas. *See, Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637
10 (C.D. Cal 2005); *Goodyear Tire & Rubber Co. v. Kirk's Tire & Auto Servicenter*, 211 F.R.D.
11 658, 662 (D. Kan. 2003). And the subpoena’s compliance with the Rule 45(d)(1), Fed.R.Civ.P.
12 prohibition on “undue burden” requires the courts to consider “such factors as relevance, the
13 need of the party for the documents, the breadth of the document request, the time period
14 covered by it, the particularity with which the documents are described and the burden
15 imposed.” *United States v. International Business Machines*, 83 F.R.D. 97, 104 (S.D.N.Y.
16 1979).

17 Thus, the Rule 26(b)(1) limitation of discovery to “non-privileged matter[s] that [are]
18 relevant to any party’s claim or defense and proportional to the needs of the case” applies to
19 the Brailsfords’ Subpoena. *See, Gonzales*, 234 F.R.D. at 679-80. As to these Rule 26(b)(1)
20 relevance standards, the federal courts have adopted a stricter relevance standard in evaluating
21 non-party subpoenas. *See Dart Indus. Co. v. Westwood Chem. Co.*, 649 F.2d 646, 649 (9th Cir.
22 1980) (“While discovery is a valuable right and should not be unnecessarily restricted . . . , the
23 'necessary' restriction may be broader when a nonparty is the target of discovery.”); *see also*
24 *Laxalt v. McClatchy*, 116 F.R.D. 455, 458 (D. Nev. 1986) (“The standards for nonparty
25 discovery . . . require a stronger showing of relevance than for simple party discovery.”).

26 The application of Rule 26 also means that the Subpoena is subject to the prohibitions
27 in Rule 26(b)(2)(C), Fed.R.Civ.P. against discovery: (1) that is unreasonably cumulative or
28 duplicative; (2) that can be obtained from some source that is more convenient, less

1 burdensome, or less expensive; (3) that the party issuing the subpoena has had ample
2 opportunity to obtain in discovery. *See, Gonzales*, 234 F.R.D. at 679-80 (citing former version
3 of the rule at Rule 26(b)(2)(i),(ii), and (iii), Fed.R.Civ.P., now Rule 26(b)(2)(C)); *see also*,
4 *Silcox*, No. C17-1131 RSM, 2018 U.S. Dist. LEXIS 53536, at *6-7. Moreover, the rules against
5 annoyance, embarrassment, oppression, and undue burden and expense under Rule 26(c)(1),
6 Fed.R.Civ.P. applies here. *See Silcox*, No. C17-1131 RSM, 2018 U.S. Dist. LEXIS 53536, at
7 *6-7. The District Court in *Silcox* explained the interaction of all these rules as applied to Rule
8 45 subpoenas.

9 After the 2015 amendments to Rule 26, “[t]he parties and the court have a
10 collective responsibility to consider the proportionality of all discovery and
11 consider it in resolving discovery disputes.” Fed. R. Civ. P. 26, Advis. Comm.
Notes for 2015 Amends.

12 Even where evidence is relevant and proportional, the Court may limit
13 discovery where “the discovery sought is unreasonably cumulative or duplicative,
14 or can be obtained from some other source that is more convenient, less
15 burdensome, or less expensive.” Fed. R. Civ. P. 26(b)(2)(C)(i). Further, for good
16 cause, the Court may limit discovery by “issu[ing] an order to protect a party or
person from annoyance, embarrassment, oppression, or undue burden or
expense.”

17 These are the standards the Brailsfords and their counsel were expected to respect when drafting
18 the Subpoena.

19 However, they did not. Instead, the Brailsfords failed to meet their obligation to consider
20 proportionality of the discovery at all, and the Subpoena violates the restrictions under Rule
21 26(b)(1) and 26(b)(2)(C), and thereby also violates Rule 45, Fed.R.Civ.P.

22 **B. The Subpoena is facially and grossly overly broad and non-proportional.**

23 A discovery request is facially overly broad if it “applies to a general category or group
24 of documents or a broad range of information.” *Moses v. Halstead*, 236 F.R.D. 667, 672 (D.
25 Kan. 2006) (cited with approval in *Moser v. Health Ins. Innovations, Inc.*, No. 17cv1127-
26 WQH(KSC), 2018 U.S. Dist. LEXIS 215901, at *43 (S.D. Cal. Dec. 21, 2018)). Therefore,
27 “omnibus requests” which “appear to seek every document ever associated with” a particular
28 category of activities or events are facially invalid. *Moser*, No. 17cv1127-WQH(KSC), 2018

1 U.S. Dist. LEXIS 215901, at *43. Moreover, “a discovery request without any temporal or
2 other reasonable limitation is objectionable on its face as overly broad.” *Eugenio v. Sempra*
3 *Energy*, No. 10cv1513-CAB(KSC), 2015 U.S. Dist. LEXIS 184475, at *6-7 (S.D. Cal. Mar.
4 30, 2015) (citing, *Ehrlich v. Union Pacific R.R. Co.*, 302 F.R.D. 620, 625 (D. Kan. 2014);
5 *Johnson v. Kraft Foods North America, Inc.*, 236 F.R.D. 535, 541-542 (D. Kan. 2006)).

6 As for electronic records, the federal courts have made it clear that parties have no
7 “generalized right to rummage at will through” another party’s personal electronic records, and
8 must instead always make “a threshold showing that the requested information is reasonably
9 calculated to lead to the discovery of admissible evidence.”” *Mailhoit v. Home Depot U.S.A.,*
10 *Inc., et al.*, 285 F.R.D. 566, 570 (C.D. Cal. 2012) (quoting *Tompkins v. Detroit Metropolitan*
11 *Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012)); *Davenport v. State Farm Mut. Auto. Ins. Co.*,
12 2012 U.S. Dist. LEXIS 20944, 2012 WL 555759 at *1 (M.D. Fla. Feb. 21, 2012)). Things like
13 requests for all e-mails or text messages or other records from an electronic device or account
14 are “facially overly broad”. See, *Russell v. Kiewit Corp.*, No. 18-2144-KHV, 2019 U.S. Dist.
15 LEXIS 93078, at *7-8 (D. Kan. June 4, 2019) (sustaining objection to request by plaintiff
16 former employee for his entire e-mail account at former employer). Similarly, requests for the
17 entire content of a social media account are facially overbroad, and the argument that broad
18 production of social media postings or messaging of a deceased victim or their spouse may
19 uncover records relevant to emotional harm claims of the spouse and surviving children will
20 not justify such requests. *Shinedling v. Sunbeam Prods.*, No. ED CV 12-438-CJC (SPx), 2013
21 U.S. Dist. LEXIS 198466, at *5-8 (C.D. Cal. Sep. 13, 2013) (Sunbeam's request for the
22 complete Facebook accounts of decedent and surviving spouse is overbroad); see *Mailhoit*, 285
23 F.R.D. at 569 n.2 (“As written, [defendant's] Requests for Production seem to require
24 production of the entire contents of Plaintiff's SNS accounts and are overbroad.”); see also
25 Bruce E. Boyden, *Oversharing Facebook Discovery and the Unbearable Sameness of Internet*
26 *Law*, Ark. L. Rev. 39, 52-53 (2012) (“[O]rdering production of an entire account is in most
27 cases inappropriate, as is requiring opposing counsel to have access. This is true even in cases
28 where the plaintiff complains of emotional distress, thus arguably making all of her mental

1 states relevant.”). What’s more, while the Brailsfords have rejected the idea that Laney Sweet
2 and those she was communicating or sharing with over her phone have any protectable privacy
3 right, the U.S. Supreme Court and the lower federal courts have repeatedly disagreed, especially
4 as electronic storage of communications and private information has encouraged the type of
5 untethered subpoena demands at issues here. *See, e.g., City of Ontario v. Quon*, 560 U.S. 746,
6 130 S. Ct. 2619, 2629-630, 177 L. Ed. 2d 216 (2010); *Special Mkts. Ins. Consultants, Inc. v.*
7 *Lynch*, 2012 U.S. Dist. LEXIS 61088, *11 (N.D. Ill. May 2, 2012)(quashing subpoenas to non-
8 parties for electronic communication records and noting that the U.S. Supreme Court requires
9 a “careful consideration of the factual situation and a “measured approach” to protect privacy
10 interests of parties in their personal communications).

11 As further examples, in *HomeLife in the Gardens, LLC*, No. 16-15549, 2018 U.S. Dist.
12 LEXIS 19204, at *9) (citing *Hunsaker v. Proctor & Gamble Mfg. Co.*, 2010 U.S. Dist. LEXIS
13 137279, 2010 WL 5463244, at *4 (D. Kan. 2010), the court considered two non-party
14 subpoenas that sought: (1) “[a]ny and all communications including but not limited to emails
15 and text messages by and between [various named persons] regarding HomeLife in the Gardens
16 and/or [Defendant] from 05/01/2016-present”; and (2) “[a]ny and all communications including
17 but not limited to emails, detailed telephone records, text records or logs to or from
18 [Defendant’s] cell phone number (504) 235-1421 from 05/01/2016-present.” *Id.*, 2010 U.S.
19 Dist. LEXIS 137279, 2010 WL 5463244, at *9. These requests were far more tailored than the
20 Subpoena here, which is not tied to communications among any particular people, about any
21 particular subject, or during any particular time frame. Still, the *HomeLife* court found the first
22 subpoena “does not comply with the requirements of Rule 26(b) because it does not seek
23 information relevant to the case and is facially overbroad,” and it also quashed the second
24 subpoena. For the same reasons, the Court here should issue a protective order directing that
25 Setec need not respond to the defective Subpoena and further quashing it.

26 The court in *Special Mkts. Ins. Consultants, Inc.*, No. 11 C 9181, 2012 U.S. Dist. LEXIS
27 61088, at *8 addressed non-party subpoenas from a plaintiff who claimed the defendants had
28 violated their employment contracts and other duties by forming a competing company while

1 still employed by the plaintiff. The subpoenas sought “all the content of [the defendants’] e-
2 mail on their personal accounts for a year-and-a half, and all [their] text messages since January
3 2012.” The court found those subpoenas “grossly overbroad” and held that they could not be
4 justified just because the subpoenaing party possessed e-mails showing the defendants had used
5 their personal e-mail accounts to communicate with clients and competitors and to forward the
6 plaintiffs’ confidential business documents. *Id.* The non-tailored request for e-mail records
7 would logically include communications that were not relevant to the claims or defenses in the
8 case, and “[t]here is simply no logical means to limit these requests in a way that would allow
9 [the subpoenaed e-mail providers] to identify what information is relevant and what is not.” *Id.*

10 Noting that “[d]iscovery must be ‘reasonably calculated to lead to the discovery of
11 admissible evidence’” under Fed. R. Civ. P. 26(b)(1), the *Special Mkts.* court also explained
12 that “[a] subpoena for everything on an e-mail account and all text messages is not ‘reasonably
13 calculated.’” *Id.* The court further noted that the subpoenaing party had other means to obtain
14 e-mail or text messages that were relevant and within the scope of discovery. And, it concluded
15 that the plaintiff’s “dragnet subpoenas are not consistent with the Supreme Court’s measured
16 approach” to protecting the privacy interests of parties, and would “expose the [defendants] to
17 the annoyance and embarrassment of having their personal and potentially privileged
18 communications disclosed.” *Id.* Therefore, even the plaintiffs’ offer to allow the defendants to
19 review the production first “is not sufficient to mitigate the undue burden imposed by these
20 overbroad subpoenas.” *Id.* The Court issued a protective order directing that the subpoenaed
21 parties need not comply and a further order quashing the subpoenas. *Id.*

22 The foregoing demonstrate that the Brailsfords’ Subpoena is grossly and facially overly
23 broad. Its failure to set any temporal limit or timeframe for the data produced, its failure to tie
24 the demand to any disputed issues in the case, or to communications with particularly relevant
25 witnesses about relevant topics, and its demand for every single type of file or point of data –
26 texts, e-mails and e-mail attachments, downloads, social media posts, call logs, contact lists,
27 photos, videos, music files, internet search histories, and on and on – shows the Brailsfords
28 made no attempt at all to tailor their Subpoena to meet any of the controlling limitations or

1 factors under Rule 26(b) or 45(d). Moreover, the caselaw discussed above shows why a party
2 cannot merely say – “there may be something relevant in all that data because I have reason to
3 believe Ms. Sweet spoke with people about personal, emotional, or financial issues via phone
4 or text or e-mail.” They also cannot merely identify for the Court an issue that is in dispute and
5 predict that something, somewhere in all that data *could* offer a relevant commentary on the
6 issue. The Brailsfords made no attempt to serve a subpoena tailored in any required respect,
7 even after the Sweet Plaintiffs specifically walked them through all the Subpoena’s
8 deficiencies. The Court should order that Setec and its officials not respond to the Subpoena,
9 and should further order that it be quashed.

10 **C. The Subpoena unjustifiably imposes on protected privacy interests.**

11 The Brailsfords’ Subpoena also violates the personal privacy interests of Ms. Sweet, her
12 family, friends, her doula clients, and any others she may have communicated with. The Ninth
13 Circuit and Supreme Court have long recognized a party has “a constitutionally-based right of
14 privacy that can be raised in response to discovery.” *Breed v. U.S. Dist. Ct., N. Dist. Cal.*, 542
15 F.2d 1114, 1116 (9th Cir. 1976). And decisions cited above like *HomeLife in the Gardens,*
16 *LLC*, No. 16-15549, 2018 U.S. Dist. LEXIS 19204, at *9 and *Special Mkts. Ins. Consultants,*
17 *Inc.*, No. 11 C 9181, 2012 U.S. Dist. LEXIS 61088, at *8 confirm that broad requests for
18 privately stored communication records, recordings, posts, downloads, or other forms of
19 expression or thought like personal notes, photos or search records implicate constitutionally
20 protected privacy interests that must not be imposed on absent full compliance with the Rule
21 26(b) and Rule 45(d) limits. Moreover, the decision in *Silcox*, No. C17-1131 RSM, 2018 U.S.
22 Dist. LEXIS 53536, at *6-7 confirms that this Court has further discretion under the current
23 discovery rules, particularly the proportionality factors imbued in Rule 26(b)(1), Fed.R.Civ.P.
24 and the policies against annoyance, embarrassment and oppression in Rule 26(b)(2)(C),
25 Fed.R.Civ.P. to forbid discovery even of otherwise relevant and discoverable material that is of
26 limited usefulness to the defendant and that would threaten invasion of the respected privacy
27 interests of others. The Court should protect the privacy interests of Ms. Sweet, her minor
28 children, and her doula clients. Philip Mitchell Brailsford killed Laney Sweet’s husband, and

1 N.S.’s and E.S.’s father. The Court should not allow him to impose further unwarranted injury
2 by broadly digging through and publicizing the Sweet Plaintiffs’ highly private, and non-
3 probative relationships, messaging and thoughts.

4 **D. The Court must protect the privilege concerns.**

5 The Sweet Plaintiffs cannot predict at this time all that might appear in the cell phone
6 records. But the overly broad Subpoena would require Setec to produce anything that
7 constituted a doctor-patient privileged communication. And, it also provides no method for
8 avoiding production of attorney-client privileged information that Ms. Sweet might have in
9 storage on her phone. After all, the only “carve-out” in the Subpoena is for “texts, records,
10 emails or other communication between Laney Sweet and individuals employed at Baskin
11 Richards PLC, at Geragos & Geragos, P.C., and at Freedom Law Firm, including some 8
12 specific persons from those firms. [Doc. 415-1 at Exhibit “A”]. But, as noted above, there have
13 been other attorneys from Baskin Richards PLC specifically involved in this case, and they
14 were noted as counsel of record on matters filed against the Brailsfords. [Doc. 99 (showing
15 Leslie Ross and David Wood as counsel for Ms. Sweet)]. So the Brailsfords have already
16 knowingly omitted some of the attorneys who had much direct contact with Ms. Sweet from
17 their “carve-out.” Also, how is Setec supposed to figure out who else is “an individual
18 employed at” one of the three law firms? It simply cannot. Thus, the Subpoena encourages the
19 production of attorney-client privileged or other privileged information. The Court should
20 order Setec to not respond on that basis alone.

21 **IV. Payment of the Sweet Plaintiffs’ Expenses Under Rule 26(c)(3) and Rule**
22 **37(a)(5)(A), Fed.R.Civ.P.**

23 Rule 37(a)(5)(A), Fed.R.Civ.P. provides that a court that grants a motion related to
24 discovery must award the movant's reasonable expenses, including attorney’s fees incurred in
25 making the motion, unless the motion was made before attempting to resolve the issue without
26 court action, the opposing party’s response was substantially justified or other circumstances
27 make an award of expenses unjust. Rule 26(c)(3), Fed.R.Civ.P. applies that rule to a motion
28 for a protective order, including motions for protective orders against subpoenas to non-parties.

1 *See, Special Mkts. Ins. Consultants, Inc.*, 2012 U.S. Dist. LEXIS 61088, *12-13 (finding a basis
2 to require the subpoenaing party to file a submission setting out reasons why the court should
3 not award the objecting party its expenses, including attorneys' fees, incurred in bringing the
4 motion for protective order).

5 Here, the Brailsfords were aware that the Court had issued an Order that required the
6 data from Setec be searched and produced through a completely different process. Then,
7 through direct and detailed explanation of the improprieties in the Subpoena, the Sweet
8 Plaintiffs attempted to obtain a withdrawal of the Subpoena without filing this Motion. [*See*
9 Exhibits 1, 3 and 4]. As noted in *Special Mkts.*, the insistence on full compliance with a
10 subpoena that is a violation of the Court's Order, is facially overbroad, and that failed to reflect
11 any consideration of the privacy interests the U.S. Supreme Court has commanded litigants to
12 consider and respect, provides a sufficient basis to find the subpoena was not substantially
13 justified and that an award of expenses and attorneys' fees is just. Here, the Brailsfords have
14 refused to consider or implement any of their obligations under Rule 26(b)(1),(c), Fed.R.Civ.P.,
15 deny that there were even any privacy interests to protect here, and have refused to even
16 consider amending a subpoena that could require production to them of privileged
17 communications. That is more than enough to justify an award of the Sweet Plaintiffs'
18 expenses, including attorneys' fees. The Sweet Plaintiffs therefore request such an award.

19 **V. Conclusion.**

20 The Court should issue a protective order finding that the Subpoena violates the Court's
21 Order of March 3, 2020, that it does not comply with Rule 26(b)(1), Fed.R.Civ.P., and that
22 further grounds exist under Rule 26(c)(1) and Rule 45(d)(1), Fed.R.Civ.P. for finding the
23 Subpoena invalid for threatening to violate applicable privileges, and for imposing duplicative
24 discovery and burden, embarrassment and annoyance upon the Sweet Plaintiffs. The protective
25 order should further direct that Setec not respond to the Subpoena, and the Court should also
26 order that the Subpoena is quashed. Finally, the Court, after hearing the Brailsfords' responses
27 to the expense and attorneys' fees argument above, should award the Sweet Plaintiffs the
28 reasonable expenses of bringing this motion, including their attorneys' fees.

1 RESPECTFULLY SUBMITTED this 15th of May, 2020.
2

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2020, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF system for filing to:

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23 *and as representative of the Plaintiff Estate of Daniel Shaver*

24 **IN THE UNITED STATES DISTRICT COURT**

25 **FOR THE DISTRICT OF ARIZONA**

26 Laney, Sweet an individual, et al.,
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28 Plaintiffs,
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30 v.
31
32 City of Mesa, et. al.,
33
34 Defendants.

Case No. 2:17-cv-00152-PHX-GMS
LEAD CASE

CONSOLIDATED WITH:
Case No. 2:17-cv-00715-PHX-GMS

**CERTIFICATE OF COUNSEL RE:
GOOD FAITH CONSULTATION
PRECEDING MOTION FOR
PROTECTIVE ORDER**

35 Grady Shaver, et. al.,
36
37 Plaintiffs,
38
39 v.
40
41 City of Mesa, et al.,
42
43 Defendants.

1 Pursuant to Rule 26(c)(1) and 37(a)(1), Fed.R.Civ.P., and Rule 7.2(j) of the Local Rules
2 of Practice of the United States District Court for the District of Arizona, counsel undersigned
3 hereby certifies that he has through sincere efforts and in good faith conferred with opposing
4 counsel for Philip Mitchell Brailsford and Corrine Brailsford, Ms. Karen Stillwell, to express
5 the objections of Plaintiffs Laney Sweet, her minor children N.S. and E.S., and the Estate of
6 Daniel Shaver to the Subpoena Duces Tecum issued by the Brailsfords against Setec
7 Investigations (the “Subpoena”) that is the subject of the Sweet Plaintiffs’ Expedited Motion
8 for Protective Order Against the Brailsford Defendants’ Subpoena Duces Tecum to Setec
9 Investigations, Inc. (“Motion”) to which this certification is attached. The Brailsfords’ counsel
10 stated in an e-mail to me earlier today after I had sent her a final e-mail and left a voicemail that
11 the Brailsfords “do not intend to modify or withdraw the subpoena at this time”. A copy of that
12 e-mail is also attached to the Motion, as is correspondence between counsel reflecting the good
13 faith conferral. Therefore, after such consultation and good faith efforts to try and resolve the
14 matters at issue in the Motion without court action, the parties have been unable to satisfactorily
15 resolve the matter without court action.

16 RESPECTFULLY SUBMITTED this 15th of May, 2020.

17 BASKIN RICHARDS PLC
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